In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 807

THOMAS JOHNSON SEAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A; R. III. 29) is reported at 380 F. 2d 358.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1967 (Pet. App. B). A petition for rehearing was denied on October 11, 1967 (Pet. App. C). The petition for a writ of certiorari was filed on November 9, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTIONS PRESENTED

1. Whether petitioner's arrest without a warrant was valid.

2. Whether a notebook seized by officers from petitioner's restaurant, immediately following petitioner's arrest on the restaurant grounds, was properly admitted in evidence.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Mississippi, petitioner was convicted on three counts of an indictment charging the possession of an unregistered still, the carrying on of the business of distilling without bond, and the fermenting of mash on unauthorized premises, all in violation of Internal Revenue laws, 26 U.S.C. 5601(a)(1), (4), (7), 5222 (R. I, 1–2, 15). He was sentenced to the custody of the Attorney General for three years, with five months of that period to be spent in confinement and the execution of the remainder to be suspended (R. I, 22). The court of appeals affirmed *per curiam* (R. III, 29, 33).

On July 19, 1965, at about 10:30 a.m., Treasury investigators located a still containing some 2100 gallons of fermenting mash in a swamp area adjoining property upon which petitioner operated a restaurant (R. II, 45, 56). The sole water supply to the still was furnished through a garden hose which led some 225 feet back to a water pipe on the restaurant property (R. II, 47–48, 95–97). Investigator Stewart, who had gone directly to the cafe and found it locked, pro-

ceeded to petitioner's trailer and, after knocking on the door, was informed by petitioner's wife that he would be out momentarily (R. II, 82–83, 91).

When petitioner emerged from the trailer, Investigator Campbell identified himself and inquired about the still which he had just discovered. When petitioner, who denied knowledge of the still, admitted that he paid the restaurant's water bill, he was arrested (R. II, 49). Immediately following petitioner's arrest, the agents and petitioner entered the restaurant, using a key which petitioner had procured from the trailer at the agents' request (R. II, 51, 192). After having been advised of his rights to remain silent and to consult an attorney (R. II, 63–64), petitioner admitted his involvement in the operation of the still (R. II, 65, 67). He identified certain entries in a notebook (relating to sugar, grain, gas, gallons, etc.) found by the officers in the cafe as pertaining to the operation of the still (R. II, 69, 71, 94).

The agents testified that their investigation, that morning, had been prompted by reports received from an undercover agent named Wagner that petitioner was involved in possible or probable violation of the alcohol tax laws (R. II, 61–62, 89, 91). Wagner, who had worked as a short-order cook in petitioner's restaurant during May and June, 1965, had, during that period, observed the installation of a water line running from the restaurant to the area where the hose from the still was found connected on the morning of petitioner's arrest. Wagner testified that petitioner was on the premises during the three days that this

water line was being installed (R. II, 26–32, 39–40). In addition, Wagner, on one occasion, had observed petitioner and others standing around a truck parked alongside the restaurant, on which there were 10 to 15 barrels (R. II, 32–35).

ARGUMENT

1. There is no merit to petitioner's contention that he was improperly arrested without a warrant. The arrest was made by an internal revenue agent who had, minutes before, discovered an operating still and followed its water line back to premises which he knew petitioner controlled. These facts, coupled with petitioner's admission that he paid the water bill and the information provided by the fellow agent as to possible violation of revenue laws by petitioner, provided ample probable cause for the officer to conclude that petitioner was violating the internal revenue laws.[1]

2. Petitioner was arrested on the grounds of the restaurant a few yards from the building which was under his immediate control.[2] The search of the restaurant building was therefore reasonable as an in-

[1] Internal Revenue agents have specific statutory authority to arrest without a warrant. 26 U.S.C. 7608(a)(3).

[2] Petitioner also claims that his trailer was searched under disturbing circumstances. However, his wife testified that when agent Campbell came in and saw her, he said, "Excuse me," and went into another room (R. II, 155). There is no claim here of an improper seizure from the trailer and no evidence taken therefrom was introduced at trial.

cident of the arrest.[3] See *Harris* v. *United States*, 331 U.S. 145. Whether the notebook which was seized should be properly characterized as a means and instrumentality used by petitioner in conducting his illegal business, or as mere evidence of his participation in this illegal activity, is of no consequence. See *Warden* v. *Hayden*, 387 U.S. 294.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[3] Officer Campbell testified that he asked petitioner if he would get the key to the cafe and that petitioner complied without objection (R. II, 51). Petitioner testified that he opened the cafe "[b]ecause they told me to" (R. II, 192). His testimony, read in context, does not suggest that he acted out of fear of the officers.

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